

No. 12330

United States
Court of Appeals
for the Ninth Circuit.

STANDARD INSURANCE COMPANY,
A Corporation,
Appellant,
vs.
MABLE E. WISTING,
Appellee.

Transcript of Record

Appeals from the District Court of the United States
for the District of Oregon

FILED

OCT 28 1949

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Standard Insurance Company,

In the District Court of the United States
for the District of Oregon

No. Civ. 4285

MABEL E. WISTING,

Plaintiff,

vs.

STANDARD LIFE INSURANCE COMPANY,
an Oregon Corporation,

Defendant.

COMPLAINT

Plaintiff alleges:

I.

Plaintiff is a citizen of the State of California, and defendant is a corporation incorporated under the laws of the State of Oregon. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand and no/100 Dollars (\$3,000.00).

II.

That on May 26, 1927, defendant, whose name was then Oregon Life Insurance Company, issued to Gustav H. Wisting, also known as George H. Wisting, a policy of life insurance wherein and whereby defendant promised to pay the sum of Five Thousand no/100 Dollars (\$5,000.00) to the beneficiary of said policy upon due proof of the death of said Wisting while said policy was in force.

III.

That Gustav H. Wisting died January 18, 1947, and that at the time of his death plaintiff was the beneficiary of said policy. That said policy was in force at said time.

IV.

That during his lifetime Gustav H. Wisting performed all conditions precedent to continuing said policy in force. [1*]

V.

That due proof of death of Gustav H. Wisting has been furnished defendant at its home office at Portland, Oregon, and demand has been made upon defendant by plaintiff to pay to her said sum of Five Thousand and no/100 Dollars (\$5,000.00). That defendants has refused to pay to plaintiff said sum of Five Thousand and no/100 Dollars (\$5,000.00) or any other sum whatsoever. That One Thousand and no/100 Dollars (\$1,000.00) is a reasonable sum to be allowed plaintiff as an attorney fee for the prosecution of this action.

Wherefore, plaintiff demands judgment against the defendant in the sum of Five Thousand and no/100 Dollars (\$5,000.00) together with interest thereon at the rate of Six per cent (6%) per annum from January 18, 1947, and for the further sum of One Thousand and no/100 Dollars (\$1,000.00) attorney fees, together with her costs.

/s/ DAVID SANDEBERG,

Attorney for Plaintiff.

[Endorsed]: Filed Nov. 13, 1948.

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard regularly before this Court upon the motion of the defendant to amend the answer filed herein, and the Court being fully advised in the premises and good cause appearing therefor,

It Is Hereby Ordered that the defendant be granted leave to file the amended answer heretofore tendered and filed in the above-entitled action.

Dated this 24th day of January, 1949.

/s/ CLAUDE McCULLOCH,
Judge.

[Endorsed]: Filed Jan. 26, 1949.

[Title of District Court and Cause.]

AMENDED ANSWER

Comes now Defendant, Standard Insurance Company, improperly pleaded in plaintiff's Complaint as Standard Life Insurance Company, and for answer to Plaintiff's Complaint heretofore filed herein admits and denies as follows:

I.

Defendant admits each and every allegation contained in Paragraphs I and II of Plaintiff's Complaint.

II.

Defendant admits Gustav H. Wisting died on

or about January 18, 1947, denies each and every remaining allegation contained in Paragraph III of Plaintiff's Complaint.

III.

Defendant denies each and every allegation contained in Paragraph IV of Plaintiff's Complaint.

IV.

Defendant denies each and every allegation contained in Paragraph V of Plaintiff's Complaint save and except Defendant admits it refused to pay Plaintiff the sum of Five Thousand and no/100 Dollars (\$5,000.00) or any other sum or amount whatsoever.

And for a first, further and separate answer and defense to plaintiff's Complaint, Defendant alleges as follows: [3]

I.

That the defendant issued to George H. Wisting under register date of May 21, 1927, a life insurance policy and contract of insurance bearing No. 34538 whereby the defendant promised to pay the sum of Five Thousand Dollars and no/100 (\$5,000.00) to the beneficiary of said policy upon due proof of the death of said George H. Wisting while said policy was in force.

II.

Said policy of insurance was issued by the defendant in consideration of the payment by the insured of an initial premium of \$64.05 and the advance payment of all future premiums upon said

policy; that said policy was modified by endorsement and the semi-annual premiums were modified so that a semi-annual premium became due on said policy on the 21st day of November, 1946, in the sum of \$66.05.

III.

That by the terms of said contract of insurance the same became void and lapsed for the non-payment of premiums excepting only that a period of grace of one month, not less than thirty days, was allowed for the payment of every premium.

IV.

That on the 7th day of November, 1946, the defendant mailed to the insured policy holder, George H. Wisting, a notice in writing advising the said George H. Wisting that the semi-annual premium of said policy in the sum of \$66.05 would be due on the 21st day of November, 1946, and that said notice was deposited in the United States Post Office at Portland, Oregon, with postage pre-paid and was addressed to the insured, George H. Wisting at his last known address namely, 3378 Tareco Drive, Los Angeles, 28, California.

V.

That the insured, George H. Wisting, failed to pay the said premium and that said premium never was paid and that the said policy of insurance lapsed upon the expiration of thirty days grace from and after the said premium due date of November 21, 1946.

VI.

That on or about the 8th day of January, 1947, the defendant notified the insured, George H. Wisting, that the said policy of insurance had lapsed and was no longer in force and effect.

And for a second, further and separate answer and defense to plaintiff's Complaint, defendant alleges as follows:

I.

That the insured, George H. Wisting, under the policy of insurance mentioned in plaintiff's Complaint, borrowed the full loan value on said insurance policy and exhausted all of the insured's reserve thereunder by a loan which was completed October 28, 1946; that by reason of pre-payment of interest a credit to the insured under the automatic loan provisions of the policy would have carried said insurance to November 25, 1946, but that no credit or reserve remained in favor of the insured beyond November 25, 1946; that the days of grace for payment of the premium, which was due on said policy November 21, 1946, expired and the reserve of said policy was used up and for that reason the said policy lapsed on December 21, 1946.

II.

That the total loan outstanding on said policy to the insured using all credits amounted to \$1,402.42 on November 25, 1946; that the total cash value on said date was \$1,402.36 and that if the plaintiff should have any claim against the defendant that the defendant is entitled to off-set against the same

the said loan in the sum of \$1,402.42, together with interest thereon at the rate of 6% per annum from November 25, 1946.

Wherefore, defendant prays that Plaintiff's Complaint be dismissed; that the plaintiff take nothing thereby, and that the defendant recover its costs and disbursements from the plaintiff herein.

/s/ PAUL A. SAYRE,
WINFREE, McCULLOCH,
SHULER & SAYRE,
Attorneys for Defendant.

State of Oregon,
County of Multnomah—ss.

Service of the within Amended Answer is hereby accepted in Multnomah County, this 18th day of January, 1949.

/s/ DAVID SANDEBERG,
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 24, 1949.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

Deceased knew that he did not have to pay the interest on his policy loan until May 21, 1947. From his point of view, and in layman's thinking, the interest did not become an indebtedness until then. In the absence of notice to deceased, it would be unjust to permit the Company to put a different

interpretation on "indebtedness," for the purpose of lapsing the policy.

Findings and Conclusions in accord herewith may be submitted.

Dated April 1, 1949.

• /s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed April 1, 1949. [4]

[Title of District Court and Cause.]

FINDINGS REQUESTED BY DEFENDANT

Upon motion of the defendant and in addition to other Findings of Fact and Conclusions of Law, the Court makes the following

Findings of Fact I.

The automatic loan section of the life insurance policy described in plaintiff's complaint provides:

... "This policy shall remain in force and effect as long as the increasing loan value hereof . . . is sufficient to pay for pro rata insurance for one additional day, on a quarterly premium basis, and to secure all existing indebtedness hereon, with interest."

II.

Computation of the use of the automatic loan provided in the policy to the dates of November 25, 1946 and November 26, 1946 is as follows:

“November 25, 1946:		
Cash Value as of 5-21-47.....	\$1,446.00	
Cash Value as of 5-21-46.....	1,356.00	_____
Increase in Cash Value 5-21-46 to 5-21-47	90.00	
Increase in Cash Value 5-21-46 to 11-25-46		
inclusive, 189 days: 189 x 90.00.....	46.60	
365		
Cash Value as of 5-21-46.....	1,356.00	_____
Cash Value as of 11-25-46.....	\$1,402.60	
Policy Loan taken out 10-28-46.....	\$1,394.00	
Premium to cover period 11-21-46 to 11-		
25-46 inclusive, 5 days: 5 x 33.64.....	1.84	
91.25		
Interest on loan from 10-28-46 to 11-25-46		
inclusive, 29 days: 29 x .06 x 1,394.00....	6.65	
365		
Interest on above premium from 11-21-46		
to 11-25-46 inclusive, 5 days: 5 x .06 x 1.84		
365		_____
[5]		\$1,402.49
November 26, 1946:		
Cash Value as of 5-21-47.....	\$1,446.00	
Cash Value as of 5-21-46.....	1,356.00	_____
Increase in Cash Value 5-21-46 to 5-21-47	90.00	
Increase in Cash Value 5-21-46 to 11-26-46		
inclusive, 190 days: 190 x 90.00.....	46.85	
365		

Cash Value as of 5-21-46.....	1,356.00
Cash Value as of 11-26-46.....	\$1,402.85
Policy Loan taken out 10-28-46.....	\$1,394.00
Premium to cover period 11-21-46 to 11-26-46 inclusive, 6 days: 6×33.64	2.21
	<hr/>
	91.25
Interest on loan from 10-28-46 to 11-26-46 inclusive, 30 days: $30 \times .06 \times 1,394.00$	6.87
	<hr/>
	365
Interest on above premium from 11-21-46 to 11-26-46 inclusive. 6 days: $6 \times .06 \times 2.21$	—
	<hr/>
	365
	<hr/>
	\$1,403.08

III.

Computation under the terms of the automatic loan provision of the policy as of the date of death is as follows:

"Computation showing effect of paying premium to and including January 17, 1947 by automatic loan.

Cash Value as of 5-21-47.....	\$1,446.00
Cash Value as of 5-21-46.....	1,356.00
	<hr/>
Increase in Cash Value 5-21-46 to 5-21-47	90.00
Increase in Cash Value 5-21-46 to 1-17-47	
inclusive, 242 days: 242 x 90.00.....	59.67
	<hr/>
365	
Cash Value as of 5-21-46.....	1,356.00
	<hr/>
Cash Value as of 1-17-47.....	\$1,415.67

Policy Loan taken out 10-28-46.....	\$1,394.00
Premiums to cover period 11-21-46 to	
1-17-47 inclusive, 58 days: 58 x 33.64.....	21.38
	<u>91.25</u>
Interest on loan from 10-28-46 to 1-17-47	
inclusive, 82 days: 82 x .06 x 1,394.00....	18.79
	<u>365</u>
Interest on above premium from 11-21-46	
to 1-17-47 inclusive, 58 days: 58 x .06 x	
	<u>365</u>
21.3820
	<hr/>
	\$1,434.37

Computation showing effect of paying premium to
and including January 18, 1947 by automatic loan:
Cash Value as of 5-21-47..... \$1,446.00
Cash Value as of 5-21-46..... 1,356.00

Increase in Cash Value 5-21-46 to 5-21-47	90.00
Increase in Cash Value 5-21-46 to 1-18-47	
inclusive, 243 days: 243 x 90.00.....	59.92
	<hr/>
365	
Cash Value as of 5-21-46.....	1,356.00
<hr/>	<hr/>
Cash Value as of 1-18-47.....	\$1,415.92
Policy Loan taken out 10-28-46.....	\$1,394.00
Premium to cover period 11-21-46 to	
1-18-47 inclusive, 59 days: 59 x 33.64.....	21.75
	<hr/>
91.25	

Interest on loan from 10-28-46 to 1-18-47 inclusive, 83 days: $83 \times .06 \times 1,394.00 \dots$	19.02
	<u>365</u>
Interest on above premium from 11-21-46 to 1-18-47 inclusive, 59 days: $59 \times .06 \times$	
	<u>365</u>
21.7521
	<hr/>
	\$1,434.98

Conclusions Of Law

I.

Based upon the foregoing Findings of Fact, the Court concludes that said policy of insurance lapsed on or before the 26th day of November, 1946, and was not in force and effect on January 18, 1947, the date of the death of the insured, George H. Wisting.

Dated this . . . day of April, 1949.

Judge.

WINFREE, McCULLOCH,

SHULER & SAYRE,

Attorneys for Defendant.

Due service of the within Requested Findings of Defendant is hereby accepted in Multnomah, County, Oregon, this — day of April, 1949, by receiving a copy thereof, duly certified to as such by Paul A. Sayre, of Attorneys for Defendant.

/s/ DAVID SANDEBERG,

Of Attorneys for Plaintiff.

[Endorsed]: Filed April 22, 1949. [5B]

[Title of District Court and Cause.]

FINDINGS OF FACT,
CONCLUSIONS OF LAW

The above entitled cause having come on regularly on the 4th day of February, 1949, for trial before the undersigned Judge of the above entitled Court sitting without a jury, the parties having respectively waived the right to insist upon a jury trial; the plaintiff appearing by and through her attorneys. David Sandeberg and Bardi G. Skulason, and the defendant appearing by its Secretary R. W. R. Calderwood and Paul A. Sayre, its attorney; opening statements were made by respective counsel in which opening statements it was stipulated and agreed by the respective parties that no question was raised by defendant as to proof of death, that plaintiff was the beneficiary of the insurance policy in question, that the true and correct name of defendant is Standard Insurance Company and not Standard Life Insurance Company and that no question was raised by defendant on account of the misnomer in the title and that should it become necessary the Court could determine a reasonable attorney fee to be allowed plaintiff for the prosecution of this action; after which evidence was introduced on behalf of plaintiff and defendant; that after the introduction of said evidence briefs were submitted by the attorneys for the respective parties and thereafter on the 4th day of March, 1949, oral argument [7] was made by the attorney for the respective parties and

upon completion of said oral argument on the 4th day of March, 1949, the Court took said cause under advisement and the Court having given full and due consideration to said cause and now being fully advised in the premises does now make the following:

Findings Of Fact

I.

That plaintiff is a citizen of the State of California.

II.

That defendant is a corporation incorporated under the laws of the State of Oregon and that the correct name of defendant is Standard Insurance Company and that defendant has waived any question concerning the misnomer of defendant in the title of this cause.

III.

The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

IV.

That on May 26, 1927, defendant whose name was then Oregon Life Insurance Company issued to Gustav H. Wisting, also known as George H. Wisting, a policy of life insurance wherein and whereby defendant promised to pay to the beneficiary of said policy upon due proof of the death of said Wisting while said policy was in force, the sum of \$5,000.00.

V.

That Gustav H. Wisting, also known as George H. Wisting, died January 18, 1947, and that at the time of his death plaintiff was the beneficiary of said policy. [7A]

VI.

That during his lifetime Gustav H. Wisting, also known as George H. Wisting, performed all conditions precedent to continuing said policy in force; that due proof of death of Gustav H. Wisting has been furnished defendant at its home office in Portland, Oregon, defendant having stipulated in its opening statement that no question was raised in this regard.

VII.

That demand has been made upon defendant by plaintiff that payment be made to her under this policy.

VIII.

That defendant has refused to pay to plaintiff any sum whatsoever; that \$750.00 is a reasonable sum to be allowed plaintiff as attorney fee for the prosecution of this action. That the number of life insurance policy and the contract of insurance is numbered 34538, and that said policy bears register date, May 21, 1927.

IX.

That the anniversary of said policy occurred on the 21st day of May of each year.

X.

That during his lifetime the deceased paid semi-annual premiums upon said policy as required there-

by for a period of nineteen and one-half (19½) years; that the last premium payment made by the deceased was made on the 19th day of June, 1946, and was a semi-annual premium on said policy which was due on May 21, 1946, and was made during the grace period therefor.

XI.

That on the second day of March, 1937, the [7B] deceased borrowed \$600.00 upon the policy; that interest on this loan was paid each year on the anniversary of the policy when it became due according to the records of the Company; that interest on this loan was never collected in advance but was always paid on the anniversary of the policy.

XII.

That on the 28th day of October, 1946 defendant made an additional loan to the deceased upon said policy. That said loan was in the amount of \$1,394.00; that from the proceeds of said loan the previous loan of \$600.00 was deducted as well as interest at the rate of 6% upon said loan from May 21, 1946, until October 28, 1946, so that on the 28th day of October, 1946, according to the records of the defendant, there was an indebtedness against the policy in the sum of \$1,394.00.

XIII.

That immediately prior to obtaining said loan of \$1,394.00 from which the principal and interest to date upon the old loan was deducted, plaintiff

executed a policy loan agreement in favor of defendant. That said policy loan agreement provided that interest would be due upon said new loan on the next premium anniversary date of the policy which was May 21, 1947.

XIV.

That on or about the 7th day of November, 1946, defendant mailed to the deceased a premium notice for the semi-annual premium due upon said policy on November 21, 1946. [7C] That said notice set forth only the semi-high annual premium due upon said date and contained no mention whatsoever of any interest due upon the loan. That said premium was never paid.

XV.

That thereafter upon the 24th day of November, 1946, and during the grace period of 30 days upon said premium, the deceased suffered a severe heart attack from which he died on the 18th day of January, 1947.

XVI.

That said policy contained an automatic premium loan provision which provided that if a premium was not paid when due or within the days of grace thereafter the policy would remain in effect as long as the increasing loan value would pay for pro rata insurance for one additional day, on a quarterly premium basis and "to secure all existing indebtedness hereon, with interest."

XVII.

That under said automatic loan provision the in-

creasing loan value of said policy would have continued said policy in force until the 23rd day of January, 1947.

XX.

That there is no provision in said policy permitting defendant to charge accrued interest upon the loan against said policy before said interest became due.

XXI.

That defendant attempted to charge accrued interest on said loan against the policy before it became due.

XXII.

That the charge of said accrued interest before it became due would have hastened and lapsed the policy prior to the death of the assured.

XXIII.

That no notice of charge of accrued interest before it became due was given to the assured.

XXIV.

That defendant did nothing to attempt to foreclose the policy under the provisions of the loan agreement particularly paragraph III. That defendant did not attempt to charge accrued interest thereunder and did not send notice of forfeiture thereunder.

XXVI.

That the letter of January 8, 1947, directed to the assured by the Company was not a letter declaring a forfeiture of the policy under paragraph III. of the loan agreement. [7F]

XXVII.

That the loan against the policy bore interest at the rate of 6%.

XXVIII.

That said deceased knew that he did not have to pay interest on his policy loan until May 21, 1947. From his point of view, and in layman's thinking, the interest did not become an indebtedness until then. In the absence of notice to deceased, it would be unjust to permit the Company to put a different interpretation on "indebtedness," for the purpose of lapsing the policy.

Now, therefore, based upon the foregoing Findings of Fact the Court now draws the following:

Conclusion Of Law

I.

That defendant, whose true name is Standard Insurance Company, an Oregon corporation, is and has been indebted to plaintiff in the full sum of \$5,000.00 together with interest thereon at the rate of 6% per annum from the 18th day of January, 1947, until paid, less the sum of \$1,394.00 together with interest thereon from the 28th day of October, 1946, until paid.

II.

That plaintiff is entitled to recover from defendant, correctly named Standard Insurance Company, said sum and her costs and disbursements herein incurred.

III.

That plaintiff is entitled to recover of and from

defendant, Standard Insurance Company, an Oregon corporation, attorney fees in the sum of \$750.00. [7G]

IV.

That plaintiff is entitled to judgment against defendant, and judgment shall forthwith be entered in favor of plaintiff against defendant in the full sum of \$5,000.00 together with interest thereon at the rate of 6% per annum from the 18th day of January, 1947, until paid, less the sum of \$1,394.00 together with interest thereon at the rate of 6% per annum from October 28, 1946, until payment of this judgment and for the additional sum of \$750.00 attorney fees together with plaintiff's costs and disbursements herein incurred.

Dated this 18th day of May, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

State of Oregon.

County of Multnomah—ss.

Due service of the foregoing Findings of Fact, Conclusions of Law submitted by plaintiff, by copy as prescribed by law is hereby admitted, at Portland, Oregon, this 15th day of April, 1949.

/s/ PAUL A. SAYRE,
Attorney for Defendant.

[Endorsed]: Filed May 18, 1949. [7H]

[Title of District Court and Cause.]

OBJECTIONS TO AND MOTION TO AMEND FINDINGS OF FACT

Now comes the defendant in the above-entitled cause and in response to plaintiff's request for Findings of Fact and Conclusions of Law objects to the Findings, and, using the plaintiff's numbering of Findings, moves to amend and specifies objections as follows:

Finding No. IV.

Finding No. IV should be amended by adding thereto "subject to all of the conditions of the said policy."

Finding No. V.

Approves of the Finding that George H. Wisting died January 18, 1947, but objects to the balance of the Finding as a conclusion of law and not a finding of fact.

Finding No. VI.

Objects to the Finding that all conditions precedent to continuing said policy in force have been performed for the reason that the same is a conclusion of law.

Finding No. VIII.

Defendant objects to this Finding upon the ground that no attorney's fee is assessable herein.

Finding No. XI.

Defendant objects to Finding No. XI for the reason that the same is irrelevant and immaterial and has no bearing upon the issues of this case.

Finding No. XII.

The defendant objects to Finding No. XII on the ground that the same is immaterial excepting as to the latter part, namely "that on the 28th day of October, 1946, there was an indebtedness against the policy in the sum of \$1394.00."

Finding No. XIII.

The defendant objects to the last sentence in Finding No. XIII on the ground that the same is irrelevant and immaterial.

Finding No. XV.

The defendant objects to Finding No. XV for the reason that the same is irrelevant and immaterial and not in support of the decision in this case, and for the further reason that there has been no proof of disability in accordance with the terms and conditions of the said life insurance policy and a finding upon such matter is not warranted by the evidence in this cause.

Finding No. XVI.

The defendant objects to Finding No. XVI upon the basis that the same is inaccurate and that the Finding is not in accord with the automatic loan provision of the policy more particularly designated as paragraph VII in said policy.

Finding No. XVII.

Defendant objects to Finding No. XVII upon the ground that the said Finding is not supported

by the evidence and that the same should be in accord with the Findings submitted by the defendant.

Finding No. XVIII.

The Defendant objects to Finding No. XVIII for the reason that the same is inaccurate, not according to the evidence and in conflict with the provisions of the automatic premium loan provision of the said insurance policy, which specifically provides for an automatic loan to pay the premium "provided that the loan value hereon shall exceed the amount of any premium then unpaid and of any indebtedness of the insured to the company," and in conflict with the further provision of said automatic premium loan clause in that said clause provides that the said insurance shall remain in force as long as the loan value "is sufficient to pay for pro-rata insurance for one additional day on a quarterly premium basis and to secure all existing indebtedness hereon with interest."

Finding No. XIX.

Defendant objects to Finding No. XIX upon the ground that there is no evidence to support the said finding and that the said finding is directly contrary to evidence submitted by the defendant.

Finding No. XX.

Defendant objects to Finding No. XX upon the ground that the same is contrary to evidence and in conflict with the provisions of the said insurance policy.

Finding No. XXI.

Defendants objects to Finding No. XXI on the ground that the same is contrary to the evidence, that the evidence shows that no interest was charged prior to the due date, except when a loan was made at which time the provisions of the policy were followed by deducting interest to the date of the loan.

Finding No. XXIII.

Defendant objects to Finding No. XXIII for the reason that the same is irrelevant and immaterial and that the policy was not lapsed by foreclosure of the loan but for non-payment of premium.

Finding No. XXIV.

Defendant objects to Finding No. XXIV for the reason that said policy was not forfeited for non-payment of loan but for non-payment of premium and that the said Finding is irrelevant and immaterial.

Finding No. XXV.

Defendant objects to Finding No. XXV upon the same grounds and for the same reasons as set forth in Findings XXIII and XXIV.

Finding No. XXVI.

Defendant objects to Finding No. XXVI upon the same grounds and for the same reasons as set forth in Findings XXIII and XXIV.

Finding No. XXVIII

Defendant objects to Finding No. XXVIII upon

the ground that the same is irrelevant and immaterial and a conclusion of law.

Conclusions of Law

The defendant objects to the conclusions of law submitted by plaintiff upon the ground and for the reason that the same are not supported by the evidence and the findings.

The defendant further moves the Court for additional Findings of Fact and Conclusions of Law as submitted herewith and at the argument of this motion will contend that the said policy of insurance lapsed as set forth in said Findings, and that under the terms of the policy interest upon indebtedness accrued day by day and reduced the reserve of said policy so that an automatic premium loan would not carry said policy to the date of death, and that at the argument of this motion the defendant will cite *Reynolds v. Northwestern Mutual Life Insurance Company*, 10 N.E. 2nd 70, and other cases in support thereof.

Dated this 21 day of April, 1949.

/s/ PAUL A. SAYRE,

Attorney for Defendant.

Due service of the within Objections to and Motion to Amend Findings of Fact is hereby accepted in Multnomah County, Oregon, this day of April, 1949, by receiving a copy thereof, duly certi-

fied to as such by Paul A. Sayre, of attorneys for Defendant.

/s/ DAVID SANDEBERG—R,
Of Attorneys for Plaintiff.

[Endorsed]: Filed April 22, 1949.

[Title of District Court and Cause.]

MEMORANDUM ON ENTRY OF JUDGMENT

There are elements of fair dealing and notice in this case that I have hesitated to comment on until now.

For 19 years the deceased paid premiums on this policy, and now the Company seeks to defeat recovery on a technical ground, which involves but \$66.00. The Company says it must act in accord with conventional practices of other companies.

No wonder the life insurance companies in this country are threatened with Government regulation. Having accumulated billions of dollars in reserves in hardly more than a generation, out of the earnings of young and old, the companies cannot find a way to extend just the ordinary amenities of seller to customer.

In the present case, the insured was in his last illness and the insurance company had his address. He had two other policies with the Company. Could one of its executives take the time to call or write the stricken man's wife to inform her that the grace

period was running and that a small payment stood between her and realizing on insurance of 19 years standing? No. The notice she got was that the insurance had lapsed and "could they be of further assistance?"

Because these are the facts of the case, I am giving the policy a strict construction against the Company and in favor of the widow—even though I have been told other courts have held on the point at issue to the contrary.

Dated May 18, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed May 18, 1949.

In the District Court of the United States
for the District of Oregon

No. Civ. 4285

MABEL E. WISTING,

Plaintiff,

vs.

STANDARD LIFE INSURANCE COMPANY,
an Oregon Corporation,

Defendant.

JUDGMENT

The above-entitled cause having come on regularly on the 4th day of February, 1949, for trial be-

fore the Honorable Claude McColloch, Judge of the above-entitled Court in Portland, Oregon, sitting without a jury, the parties having respectively waived the right to a jury trial; the plaintiff appearing by and through her attorneys, Bardi G. Skulason and David Sandeberg, and defendant appearing by its Secretary, R. W. R. Calderwood, and Paul R. Sayre, its attorney; the Court having heard the evidence, considered the briefs and listened to the argument of the respective attorneys, and having heretofore made and filed its findings of fact and conclusions of law wherein the Court finds and concludes that the plaintiff is entitled to judgment against the defendant in the full sum of \$5,000.00 together with interest thereon at the rate of 6% per annum from the 18th day of January, 1947, until paid less the sum of \$1394.00 together with interest thereon at the rate of 6% per annum from October 28, 1946, until payment of this judgment and for the additional sum of \$750.00 attorneys' fees together with plaintiff's costs and disbursements herein incurred.

Now, Therefore, It Is Ordered and Adjudged that plaintiff have and recover of and from defendant, Standard Insurance Company, an Oregon corporation, misnamed in the title hereof as Standard Life Insurance Company, an Oregon corporation, the full sum of \$5,000.00 together with interest thereon at the rate of 6% per annum from the 18th day of January, 1947, until paid less the sum of \$1394.00 together with interest thereon at the rate

of 6% per annum from October 28, 1946, until payment of this judgment and for the further sum of \$750.00 attorney's fees together with plaintiff's costs and disbursements herein incurred taxed at \$52.41.

Dated this 26th day of May, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed May 26, 1949.

[Title of District Court and Cause.]

NOTICE OF APPLICATION TO TAX COSTS

To defendant, Standard Insurance Company, mis-named Standard Life Insurance Company, and Paul A. Sayre, its attorney:

You, and each of you, are hereby notified that the plaintiff will apply to the Clerk of the above-entitled Court to tax costs on June 3, 1949, at 10:00 a.m.

/s/ DAVID SANDEBERG,
Attorney for Plaintiff.

State of Oregon,
County of Multnomah—ss.

Due service of the foregoing Notice of Application to Tax Costs together with Statement of Disbursements by copy as prescribed by law is hereby

admitted, at Portland, Oregon, this 2nd day of June, 1949.

WINFREE, McCULLOCH,
SHULER & SAYRE,
By /s/ HOWARD A. RANKIN,
Of Attorneys for Defendant.

[Endorsed]: Filed June 3, 1949.

[Title of District Court and Cause.]

STATEMENT

Statement of Disbursements claimed by the plaintiff in the above-entitled cause, viz:

Clerk's Fees.....	\$15.00
Marshal's Fees.....	2.06
Attorney's Fees.....	20.00
Attorney's Fees for taking Depositions at \$2.50 each.....	2.50
Depositions	12.85

Costs taxed at.....\$52.41

Date, June 4, 1949.

/s/ LOWELL MUNDORFF,
Clerk.

By /s/ P. L. BUCK,
Chief Deputy.

District of Oregon—ss.

I, David Sandeberg, being duly sworn, on my oath say that I am one of the attorneys for the plaintiff in the above-entitled cause; that the disbursements set forth herein have been actually and necessarily incurred in the prosecution of this suit; and that said plaintiff is entitled to recover the same from the defendant as I verily believe.

/s/ DAVID SANDEBERG.

Subscribed and Sworn to before me this . . . day of June, 1949.

.....,

Clerk.

By

Deputy Clerk.

[Endorsed]: Filed June 3, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Standard Insurance Company, an Oregon corporation, the defendant in the above-entitled action, hereby appeals to The United States Circuit Court of Appeals, for the Ninth Circuit, from the final judgment of this Court made and entered in this action on the 26th day of May, 1949.

June 22, 1949.

/s/ PAUL A. SAYRE,
WINFREE, McCULLOCH,
SHULER & SAYRE,

Attorneys for Appellant, Standard Insurance Company.

State of Oregon,
County of Multnomah—ss.

Due service of the within Notice of Appeal is hereby accepted in Multnomah County, Oregon, this . . . day of June, 1949, by receiving a copy thereof, duly certified to as such by Paul A. Sayre, of Attorneys for Defendant.

/s/ DAVID SANDEBERG,
Of Attorneys for Plaintiff.

[Endorsed]: Filed June 23, 1949.

—

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL

Whereas, the above-named Mabel E. Wisting, plaintiff, recovered a Judgment against the above-named Standard Insurance Company, an Oregon corporation, defendant, for the sum of Five Thousand Dollars (\$5,000.00), with interest thereon at the rate of six per cent (6%) per annum from the 18th day of January, 1947, less the sum of Thirteen Hundred Ninety-four Dollars (\$1394.00), with interest thereon at the rate of six per cent (6%) per

annum from October 28, 1946, and for the further sum of Seven Hundred Fifty Dollars (\$750.00) attorneys' fees, with plaintiff's costs and disbursements herein incurred and taxed at Fifty-two and 41/100 Dollars (\$52.41) in a civil action, tried before the Honorable Claude McColloch, United States District Judge in and for this District and State, said Judgment having been rendered on the 26th day of May, 1949; and

Whereas, the appellant is desirous of staying the execution of said judgment so appealed from:

Now, Therefore, we, Standard Insurance Company, an Oregon corporation, appellant, and Peerless Casualty Company, a New Hampshire Corporation, duly licensed to do a general surety business in the State of Oregon, as surety, do hereby jointly and severally undertake and promise, on the part of the appellant, that if for any reason said appeal is dismissed or said Judgment is affirmed, said appellant will satisfy said Judgment in full, with costs, interest and damages for delay, and that if said Judgment is modified, said appellant will satisfy such modification of Judgment in full, with such costs, interest and damages for delay as the Appellate Court may adjudge and award against said appellant on appeal.

Dated this 22nd day of June, 1949.

STANDARD INSURANCE
COMPANY.

By /s/ R. W. R. CALDERWOOD,
Appellant.

PEERLESS CASUALTY
COMPANY.

By /s/ BEULAH SPALDING,
Attorney in Fact, (Surety).

Countersigned:

DOOLY & CO.

By /s/ R. M. DOOLY,
Partner, Resident Agent.
WINFREE, McCULLOCH,
SHULER & SAYRE,

Attorneys for Appellant, 1016 Spalding Building,
Portland 4, Oregon.

Approved:

JAMES ALGER FEE,
U. S. District Judge.

State of Oregon,

County of Multnomah—ss.

Due service of the within Supersedeas Bond on
Appeal is hereby accepted in Multnomah County,
Oregon, this day of June, 1949, by receiving
a copy thereof, duly certified to as such by Paul
A. Sayre, of Attorneys for Defendant.

/s/ DAVID SANDEBERG,
Of Attorneys for Plaintiff.

[Endorsed]: Filed June 23, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
RECORD ON APPEAL

Upon Ex Parte motion of the defendant supported by stipulation of the parties, it is hereby ..

Considered and Ordered that the time within which to file and docket the record on appeal of the above cause to the United States Court of Appeals for the Ninth Circuit be and it is hereby extended to and including the 1st day of September, 1949.

Dated at Portland, Oregon, this 28th day of July, 1949.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed July 28, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT WILL RELY ON APPEAL

Defendant-appellant having filed its Notice of Appeal from Judgment of this Court to the United States Court of Appeals for the Ninth Circuit and having designated portions of the record herein to be contained in the record on appeal hereby files its statement of points on which it intends to rely upon appeal as follows:

I.

The Court erred in finding:

- (a) That the insured, Gustav H. Wisting also known as George H. Wisting, performed all conditions precedent to continuing the life insurance policy in question in force until the date of the death of the insured, namely, January 18, 1947;
- (b) In failing to find that the said policy lapsed for non-payment of premium upon the expiration of thirty (30) days of grace allowed by the policy, namely, on December 21, 1946.

II.

The Court erred in finding that the policy of life insurance in question was kept in force until the date of the death of the insured by virtue of an automatic loan under the terms of the policy, and in making the following specific findings in regard thereto:

- (a) In finding that there was any loan value in said policy of a sufficient amount that an automatic loan must be made to keep said policy in force until January 18, 1947, the date of the death of the insured, or to January 23, 1947, or to any date subsequent to November 26, 1946;

- (b) In finding that the loan value of said policy increased by earnings which accrued from day to day to the date of death but that interest on indebtedness did not accrue day by day to the date of death and did not become indebtedness decreasing the loan value.

III.

The Court erred in that contrary to law and contrary to the facts adduced at the trial of this cause, it gave judgment to the plaintiff for Five Thousand Dollars (\$5,000.00), together with interest thereon at the rate of six per cent (6%) per annum from January 18, 1947, until paid, less the sum of One Thousand Three Hundred Ninety-four Dollars (\$1,394.00) together with interest thereon at the rate of six per cent (6%) per annum from October 28, 1946, until payment of the judgment, and in giving judgment for the further sum of Seven Hundred Fifty Dollars (\$750.00) attorney's fees, together with plaintiff's costs and disbursements.

Dated this 30th day of July, 1949.

WINFREE, McCULLOCH,
SHULER & SAYRE.

By /s/ PAUL A. SAYRE,
Attorneys for Appellant.

State of Oregon,
County of Multnomah—ss.

Due service of the within Statement of Points upon which Appellant will Rely on Appeal is hereby accepted in Multnomah County, Oregon, this 30th day of July, 1949, by receiving a copy thereof, duly certified to as such by Paul A. Sayre, of attorneys for defendant.

/s/ DAVID SANDEBERG,
Of Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 1, 1949.

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD
ON APPEAL PURSUANT TO RULE 75(a)

Comes now the defendant-appellant and designates the following portions of the record, proceedings, and evidence in the above-entitled cause to be contained in the record on appeal of said cause:

1. Original Complaint, filed November 13, 1948.
2. Order granting leave to file Amended Answer, dated January 24, 1949, and filed January 26, 1949.
3. Amended Answer, filed January 24, 1949.
4. Memorandum of Decision, dated April 1, 1949, and filed April 1, 1949.
5. Findings of Fact and Conclusions of Law, requested by plaintiff.
6. Objections to and motion to amend Findings of Fact, filed April 22, 1949.
7. Findings of Fact and Conclusions of Law, requested by defendant, filed April 22, 1949.
8. Findings of Fact and Conclusions of Law, made, entered and filed by the Court on May 18, 1949.
9. Memorandum on entry of Judgment dated May 18, 1949, and filed May 18, 1949.
10. Judgment, filed May 26, 1949.
11. Cost Bill of Plaintiff, filed June 3, 1949.
12. Notice of Appeal, filed June 23, 1949.
13. Supersedeas Bond on Appeal, filed June 23, 1949.
14. Reporter's transcript of proceedings and

evidence certified June 16, 1949, and all exhibits introduced by plaintiff or defendant during the trial of this cause.

15. Order extending time to docket record on appeal entered July 28, 1949.

16. Statement of points upon which appellant will rely on appeal.

17. Designation of portions of record on appeal pursuant to Rule 75(a).

18. Order to forward all original exhibits.

Dated this 29th day of July, 1949.

WINFREE, McCULLOCH,
SHULER & SAYRE.

By /s/ PAUL A. SAYRE.

State of Oregon,

County of Multnomah—ss.

Due service of the within Designation of Portions of Record on Appeal Pursuant to Rule 75(a) is hereby accepted in Multnomah County, City of Portland, Oregon, this 1st day of August, 1949, by receiving a copy thereof, duly certified to as such by Paul A. Sayre, of Attorneys for defendant-appellant.

/s/ DAVID SANDEBERG.

Of Attorneys for Plaintiffs.

[Endorsed]: Filed Aug. 1, 1949.

[Title of District Court and Cause.]

ORDER TO FORWARD ORIGINAL EXHIBITS

Upon motion of defendant-appellant, it is hereby Considered and Ordered that the Clerk of this Court forward to the United States Court of Appeals for the Ninth Circuit in connection with the appeal of the above-entitled cause, all of the original exhibits in accordance with the usual practice of this Court in regard to the safekeeping for transportation of original exhibits.

Dated at Portland, Oregon, this 2nd day of August, 1949.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed Aug. 2, 1949.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the parties hereto, by and through their respective attorneys that the record on appeal in the above-entitled case be corrected so as to conform to the truth in the following particulars, to-wit: That the transcript of proceedings be corrected as follows:

1. That on page seven thereof in the second line of the third complete paragraph on said page, the word made be substituted for the word unpaid.

2. That on page fourteen thereof in the fourth line of the eighth complete paragraph on said page, the word the be substituted for the word they.

3. That on page eighteen thereof in the third line of the first complete paragraph on said page, the word November be substituted for the word December.

4. That on page twenty-three thereof in the fourth line of the first complete paragraph on said page, the numeral 7 be changed to numeral 4.

5. That on page thirty-one thereof in the fourth line of the first complete paragraph on said page, the numeral 3 be changed to numeral 4.

6. That on page thirty-one thereof in the first line of the second complete paragraph on said page, the numeral 3 be changed to numeral 4.

[Endorsed]: Filed Aug. 9, 1949.

[Title of District Court and Cause.]

PLAINTIFF-APPELLEE'S DESIGNATION OF
PORTIONS OF RECORD ON APPEAL
PURSUANT TO RULE 75(a)

Comes now the plaintiff-appellee and designates the following portions of the record, proceedings, and evidence in the above entitled cause to be contained in the record on appeal of said cause, said designation covering portions not designated by defendant-appellant:

1. That portion of plaintiff's memorandum containing the following sentence, which begins on line 17, page 3 thereof: "The statement attached to the check (Defendant's Exhibit 9) shows an item of \$46.98 accrued interest; how this figure was reached is a mystery although the same figure appears on a pink slip in the file which refers to the premium notice of November 7, 1946 (Defendant's Exhibit 8)."

2. That portion of defendant's memorandum, which contains the following sentences beginning on line 28, page 3 thereof: "On page 3 line 18 of the memorandum a figure of \$46.98 is shown and mention is made in line 19 that this figure is a mystery. Actually this \$46.98 represents the amount of interest which would have been due on the next anniversary, May 21, 1947. It is equal to 6% interest on \$1394.00 from October 28, 1946 to May 21, 1947, a period of 205 days. The calculation of this figure is as follows:

$$\begin{array}{r} 205 \times .06 \times \$1394.00 = \$46.98 \\ \hline 365 \end{array}$$

"This amount shows on the form so that records for collecting the proper amount of interest might be set up at the time the loan was made."

3. That portion of plaintiff's memorandum containing the following sentences, which begin on line 22, page 3 thereof: "The statement of the loan attached to the check also bears a figure of \$83.64 denoted as interest charges; where this would come

from is likewise a mystery. On November 7, 1946, defendant sent to the deceased a premium notice (Defendant's Exhibit 4 and pink slip in file, Defendant's Exhibit 8)."

4. That portion of defendant's memorandum containing the following sentences, which begin on line 8, page 4 thereof: "On page 3 line 23, of the memorandum a figure of \$83.64 is shown which is again referred to as a mystery. This amount represents 6% of the \$1394.00 which is a year's interest on the amount of the loan. It represents the amount of the interest which would have been charged each year beginning May 21, 1947 as long as the loan continued at \$1394.00. The reason it appeared on the statement of loan was for the purpose of setting up records for collection of future interest."

5. Stipulation of parties to correct record on appeal.

6. Order correcting record on appeal.

7. This supplemental designation.

Dated this 8th day of August, 1949.

/s/ DAVID SANDEBERG,

Of attorneys for plaintiff-appellee.

State of Oregon,

County of Multnomah—ss.

Due service of the foregoing plaintiff-appellee's designation of portions of record on appeal pursuant to rule 75(a) by copy as prescribed by law

is hereby admitted, at Portland, Oregon, this 8th day of August, 1949.

/s/ PAUL A. SAYRE,
Attorney for Defendant-
Appellant.

[Endorsed]: Filed Aug. 9, 1949.

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents *consisting* of complaint, order to amend answer, amended answer, memorandum decision, findings requested by defendant, defendant's objections to amend findings, findings of fact and conclusions of law, memorandum of Judge McColloch, judgment, notice to tax costs, cost bill, notice of appeal, bond, order extending time to docket record, statement of points, designation of record, order to forward exhibits, stipulation to correct transcript of proceedings, order to correct transcript of proceedings, designation of appellee, transcript of portion of plaintiff's brief, transcript of portion of defendant's brief, transcript of docket entries, and clerk's certificate, constitute the record on appeal from a judgment of said court in cause numbered Civil 4285, in which Mabel E. Wisting is plaintiff and appellee, and Standard Life Insurance Company, an Oregon corporation, is defendant and appellant; that the said record has been prepared by me in accordance with

the designation of contents of record on appeal filed by appellant, and additional designation filed by appellee, and in accordance with the rules of this court.

I further certify that there is enclosed herewith a duplicate transcript of proceedings dated February 4, 1949, filed in this office in this cause, together with exhibits 1 to 10 inclusive.

I further certify that the cost of preparing the foregoing transcript is \$7.80, which includes the filing of notice of appeal, and that the same has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 11th day of August, 1949.

LOWELL MUNDORFF,
Clerk.

[Seal] By /s/ F. L. BUCK,
Chief Deputy.

United States District Court, District of Oregon
Civil No. 4285

MABEL E. WISTING,
Plaintiff,
vs.

STANDARD LIFE INSURANCE COMPANY,
an Oregon corporation,
Defendant.

Portland, Oregon, Friday, Feb. 4, 1949

Before: Honorable Claude McColloch,
Judge.

Appearances:

DAVID SANDEBERG
B. G. SKULASON
Attorneys for Plaintiff.

PAUL A. SAYRE
WINFREE, McCULLOCH, SHULER &
SAYRE
Attorneys for Defendant.

TRANSCRIPT OF PROCEEDINGS

Mr. Sandeberg: The parties are ready at this time. I would like to ask that Mr. Skulason again be entered on the record as associate with me as one of the attorneys for the plaintiff.

If the Court please, there has been no pre-trial in this matter, and at the present time the parties are

before the [*1] Court on the complaint and amended answer of the defendant. It is a suit upon a life insurance policy which was issued to the husband of the plaintiff on May 26, 1927.

Paragraph I of the complaint, alleging jurisdiction, has been admitted, that plaintiff is a citizen of the State of California and defendant is an Oregon corporation.

The defendant's policy has likewise been admitted. The policy was in the sum of \$5,000, and that has been admitted by the defendant.

Further than that, we allege in Paragraph III that the deceased died on January 18, 1947, and that at the time of his death the plaintiff was the beneficiary of said policy. Their answer denied generally all the allegations of that paragraph with the exception of the fact that the deceased died on January 18, 1947. However, since the taking of the deposition of Mr. Calderwood, and the policy likewise on its face shows that she was the beneficiary, I do not believe there is any dispute on that point at the present time?

Mr. Sayre: That is correct.

Mr. Sandeberg: The third paragraph also alleges as a conclusion of law that the policy was in force at the time of his death.

Paragraph IV of the complaint alleges that during his lifetime Gustav H. Wisting performed all conditions precedent to continuing said policy in force. The original answer in this [2] case merely

* Page numbering appearing at top of page of original Reporter's Transcript.

denied that paragraph generally, rather than specifically, with particularity in accordance with the rule, and, based on that, a motion for summary judgment was filed, which your Honor denied, and thereafter an amended answer was tendered and your Honor permitted the same to be filed.

Further than that, the complaint alleges that due proof of death of Gustav H. Wisting was furnished to the defendant at its home office at Portland, Oregon, and demand has been made upon defendant by plaintiff to pay to her the sum of \$5,000. This was denied in the original answer. However, on the deposition of the secretary of the defendant this matter was admitted and I do not believe there is any question about due proof of death, is there, Mr. Sayre?

Mr. Sayre: There is no question but that proof of death was made in connection with other policies which the company had, and that there was a claim made on this policy, not in the regular form. We admit that. I think that is probably sufficient for the purposes of this case, that proof of death has been acknowledged and that they have made a claim—not in the usual manner, however.

Mr. Sandeberg: I might say, your Honor, that in connection with the deposition of Mr. Calderwood the following question was asked and he made the following answer:

“Q. And as far as this policy is concerned, there is no irregularity as far as due proof of death, [3] as far as your company is concerned, is there?

“A. Oh, no, no.

“Q. That isn’t the reason for your non-payment? A. No.

“Q. You are not questioning that at all?

“A. No.”

So, I understand the question of proof of death is not going to arise in this case or come up as a matter of defense.

They admit that they have refused to pay us the sum of \$5,000 on this policy. They deny the amount of attorney’s fees alleged and Mr. Sayre and I—I believe I am correct in stating this—have agreed that if it becomes necessary to fix attorney’s fees the Court may determine them. Is that correct?

Mr. Sayre: Yes, that is satisfactory. It may be stipulated that if the plaintiff becomes entitled to attorney’s fees herein the same may be fixed by the Court.

Mr. Sandeberg: The amended answer of the defendant is the same as the original answer. However, the defendant sets forth a first, further and separate answer and a second further and separate answer.

In the first further and separate answer the defendant alleges the issuance of this policy on May 21, 1927, setting forth the number and the amount thereof. It further sets forth that the said policy of insurance was issued by the defendant in consideration of the payment by the insured of an initial [4] premium of \$64.05 and the advance payment of all future premiums upon said policy; that

the said policy was modified by endorsement and the semi-annual premiums were modified so that a semi-annual premium became due on said policy on the 21st day of November, 1946, in the sum of \$66.05. I believe the policy states on its face that the premiums were \$55, or something like that. I am not certain as to this particular allegation but I am sure it will be cleared up as the testimony comes in.

Then they allege that by the terms of the contract the insurance policy became void and lapsed for non-payment of premiums excepting only that a period of grace of one month, not less than thirty days, was allowed for the payment of every premium.

Then they state that on the 7th day of November, 1946, the defendant mailed to the insured policy holder, at his last known address, a semi-annual premium notice, which notice I have here, calling for the payment of the sum of \$66.05, stating that it would be due on the 21st day of November, 1946; that the said notice was deposited in the United States Post Office at Portland, Oregon, with postage prepaid, addressed to the insured at his last known address.

It is further alleged that he failed to pay that premium, that the premium never was paid and that the policy of insurance lapsed upon the expiration of thirty days' grace from and after the said premium due date of November 21, 1946. [5]

It must be borne in mind that he died January

18, 1947. They further allege that on or about the 8th day of January, 1947, they notified the insured that the said policy of insurance had lapsed and was no longer in force and effect. I have their original letter in which they so notified the insured.

For a second further and separate answer, they allege that the insured, under the policy of insurance, borrowed the full loan value on said insurance policy and exhausted all of the insured's reserve thereunder by a loan which was completed October 28, 1946; that is less than a month before the 21st of November when this premium became due and less than three months before he died.

They further state that by reason of the pre-payment of interest a credit to the insured under the automatic loan provisions of the policy would have carried said insurance to November 25, 1946, and that the days of grace for payment of the premium, which was due on the policy November 21, 1946, expired and the reserve of said policy was used up and for that reason the said policy lapsed on December 21, 1946, less than a month before he died.

They further allege that the total loan outstanding on said policy to the insured, using all credits, amounted to \$1,402.42 on November 25, 1946; that the total cash value on said date was \$1,402.36; and that if the plaintiff should have [6] any claim against the defendant, the defendant is entitled to offset against the same the said loan in the sum of \$1,402.42, together with interest thereon at the rate of 6 per cent per annum, and so forth.

As far as the plaintiff is concerned in this matter, obviously we do not have any direct knowledge of exactly what transpired, as far as that policy is concerned. The negotiations, if any, were carried on by Mr. Wisting, and under the circumstances we are insisting on strict proof. I understand that Mr. Sayre has brought all of his records on this matter into court and we will have a full and complete picture of the situation at the time of trial.

We intend to raise numerous questions. However, they will depend to some extent on what the evidence in this matter actually is. Up until now I have had to speculate as to what it might be. They will also depend to a substantial extent upon the position taken in this matter.

The policy, we contend, contains a mandatory provision that when a loan is made the premium for the balance of the year shall be deducted, and the company failed to do this, and we contend that under the circumstances they cannot take advantage of their own violation of the policy, and that this was mandatory.

I have been advised that Counsel is going to rely on the case—on a case in this Circuit to the effect that the provision requiring deduction of unpaid balance on the premium [7] from the loan on the policy is for the benefit of the company and can be waived, and that the company did waive it. I don't know whether that will be Counsel's contention or not, but I presume it will be. If such is his contention, I have an answer that I will wish to make to that, but, until such time as I am advised as to

what he will say in that regard, I am unable to state whether or not that will be my answer.

I might say that this policy is written under the laws of the State of Oregon and the policy contains provisions which are, in the main, like the statute. However, on this matter of policy loans and deductions, there is a slight difference between the terms of the policy and the terms of the statute, so my understanding of the rule in that case is that whichever is more favorable to the insured, in case there is any discrepancy between the policy provisions and the statute.

Further, we have a letter, signed by Mr. Calderwood, dated April 1, 1947, to Mrs. Wisting, offering his explanation of the reason for the turndown of the loan which, under the circumstances, we might want to introduce in evidence, and if Mr. Calderwood were called to the stand we might wish to ask some questions of him about it.

The Court: I thought there was a loan.

Mr. Sandeberg: This letter is dated April 1, 1947, to the widow, explaining the reason the policy was not paid.

The Court: You misstated yourself, then. [8]

Mr. Sandeberg: I am sorry, your Honor.

The Court: You said they "turned down the loan."

Mr. Sandeberg: Turned down the payment on the policy, is what I mean.

I understand Mr. Sayre has all the records with him. In addition thereto, we have stipulated that

the plaintiff, if present, would offer certain testimony in this matter, and there is a stipulation in connection therewith in the file which may be entered of record. The stipulation is subject, of course, to Counsel's right to object to the materiality of any matters therein contained. However, it is admitted that if she were present she would testify as stated and set forth in the stipulation. I believe that is correct, Mr. Sayre?

Mr. Sayre: That is right.

Mr. Sandeberg: At the time the deposition of Mr. Calderwood was taken, he was asked to identify the policy and examine it, and to state whether or not the policy was the same as shown by the company's records and, after checking his own record at the time the stipulation was submitted to him for signature, he apparently was agreeable that this was the policy, the company's policy, and that policy was attached to the deposition which is on file with the Clerk. That will also be a part of this record.

It so happens the stipulation reveals that the deceased suffered a heart attack on the 24th of November, 1946, three days after the premium became due and approximately twenty-seven days [9] before the days of grace expired; that he was told by a doctor that he would never work again and that he was in a state of despair, et cetera; and that in the opinion of Mrs. Wisting he was not mentally competent to think of an insurance policy; that the only letter that was ever received at the house from

the company was a letter of January 8, 1947, alleging that the policy had lapsed. That material will be important in connection with plaintiff's contentions in connection with the waiver of premium benefits on the policy.

I might say that if Counsel does contend that the provisions relative to deducting the unpaid premium from the face of the policy were not mandatory and that they were waived by the company, we will contend that, nevertheless, the loan value of the policy was sufficient so that under the automatic loan provisions of this policy the policy could have been carried beyond the date of death, and that the insurance policy, under the automatic loan provision, was in force at the time of his death.

I regret that under the circumstances, not having all the evidence before me, I am unable to state our position any more definitely at the present time, but I believe as Counsel states his position he will be able to further advise the Court.

Mr. Sayre: If the Court please, this insurance policy, which is the subject of litigation, was issued May 21, 1927, and the premiums were paid to and including that of May 21, 1946, [10] which was paid within the days of grace of June, 1946. The premiums under the policy were payable semi-annually. I wonder if the question of whether or not this policy was modified so that the premiums due on May 21st and on November 21st, 1946, amount to \$66.05. Of course, we can go into this and prove the provisions of the policy but, since we have had

a pre-trial as to a few of these things, I am wondering if there is any dispute on that point. If there is, why, then, we will go ahead accordingly.

Mr. Sandeberg: Are you asking me at the present time?

Mr. Sayre: If I might ask Counsel, your Honor.

Mr. Sandeberg: The only purpose for it that would possibly dispute the amount of the premium would be for the purpose of showing what was required to carry the policy. I am not aware—the policy has not been in my possession—whether the additional riders, for which consideration was paid by the insured, are part of the policy, so as to carry it under the automatic loan provision before additional premiums would have been required or not, or if the original premium would have been sufficient.

Mr. Sayre: There are several things which have come up in the defense. One, of course, is that we claim that the premium due on November 21, 1946, was not paid, never was paid; that the entire loan value of the policy was used up; the loan which was closed on October 28, 1946, used up the entire loan value at [11] that time and, although by use of the prepaid interest and the balance it had under the automatic loan provision, it could have been carried to November 25, 1946, nevertheless, after that date, there was no reserve whatsoever on the policy, and that will be the contention of the defendant.

The premium notices, as I understand plaintiff

has admitted here, were sent and received by the insured; also, the letter of January 8, 1947, I believe Counsel for plaintiff has, in his statement, admitted was received, and that he has it here.

Therefore, as it stands, the defendant is insisting that the policy lapsed for non-payment of premium, that there was no reserve under the policy to carry it under the automatic loan provision. We claim that the premiums were not paid and the policy lapsed. If their contention is that under Paragraph V of the conditions of the policy that there was a mandatory provision for the company to deduct premiums to the end of the policy year—and I take it that is their contention—then that becomes a matter for your Honor.

The Court: Deducted from what?

Mr. Sayre: They apparently now are urging that the provisions in Paragraph V of the policy reading, "The company will deduct from such loan value any existing indebtedness hereon, and any unpaid balance of the premium for the current policy year . . ." was a mandatory provision and that the company should have [12] deducted from the loan which it made in October, 1946, a sufficient amount, sufficient premiums, to carry it up to May 21, 1947. I understand that is their contention now.

They do not urge it in their complaint, and we have pleaded non-payment of premiums. Our contention is that that terminates the policy. If they do make that contention here, and they are entitled to, of course we will claim two things: First, that

it would not apply and is not a mandatory provision and, after that, your Honor, we will cite a number of cases. If the Court wishes the cases now, I will give you the citation of the principal case which is 122 Fed. (2d) 395, also 137 A.L.R. 829. These cases have held that failure of the company to deduct is not a mandatory provision but for the protection of the company, and if they loaned the full amount she cannot complain that they should have loaned him less and deducted the premium. In other words, this case disputes that point.

As to the issues before the Court, it seems to me that the policy is admitted, that it was issued, that the premiums were paid on that policy up to May 21, 1946. I believe it is admitted that no premiums were paid from that time—therefore, that the premium due on November 21, 1946, was not paid—and that a loan for the full cash value of the policy was taken October 28, 1946.

Mr. Sandeberg: That is not admitted.

Mr. Sayre: That is not admitted? [13]

Mr. Sandeberg: No.

Mr. Sayre: Those being the issues, your Honor, then, it narrows really to a determination of this question of law as to the mandatory provisions of the policy, as I see it.

Perhaps we can get at this a little more readily if Mr. Calderwood, who is here, the secretary of the company, took the stand. Two or three things, I believe, should be called to the Court's attention.

The original complaint designated the defendant

as the Standard Life Insurance Company. We have corrected that by showing that the correct name is Standard Insurance Company. I trust that correction stands admitted.

Mr. Sandeberg: That is correct.

Mr. Sayre: We will put in evidence as to the amount of the loan. I think that will constitute our case.

I may say if they do urge that this is a mandatory provision, of course, we will have to urge that they waived that in borrowing or making the loan, although it is not pleaded in any way and we didn't know that at the time we filed our answer.

Mr. Sandeberg: I believe, your Honor, as far as the Griffin case is concerned, that the Court did state that the provision requiring that the unpaid balance of the premium for the current year should be deducted was not a mandatory provision; the company could waive it, and that they had a right to, if it was for their benefit. I would like to find out now if Mr. Sayre [14] does contend that that was waived.

Mr. Sayre: Naturally we contend that that was waived, if that is what they are relying upon.

Mr. Sandeberg: That is what I want to know now.

Mr. Sayre: We contend that it was waived.

Mr. Sandeberg: Very well. Under the circumstances I think I can state my position, now. The policy, on its face, provides that after three full years premium have been paid, the company, "at

any time while this policy is in force, will loan, upon the proper assignment of this policy and upon the sole security thereof, at a rate of interest which will not exceed six per centum per annum, a sum equal to, or at the option of the owner hereof, less than, the entire reserve hereon at the end of the then current policy year, including the reserve on any dividend additions then in force."

According to this policy the entire reserve at the end of the current policy year was the sum of \$1,446, which appears on the face of the policy.

The policy further provides that: "The company will deduct from such loan value any existing indebtedness hereon," and that they will deduct any unpaid balance of the premium for the current policy year, and that they will collect interest in advance on the loan to the end of the current policy year.

The Griffin case holds that these provisions are for the benefit of the company and, when they do not choose to carry [15] through with them, that they have waived them. However, it is our contention in the case that if the company waives those deductions, that does not affect the loan value which is the reserve on the policy at the end of the current policy year.

Incidentally, your Honor, as far as this case is concerned, I believe the evidence will show that if the company had followed this provision of the policy in making the loan and had deducted the balance due on the premium for the current policy

year, that the insured would have got about \$10 less than he got and his widow would have got about \$4,000 more than she got, which was nothing.

It is going to be our contention that the fact that they have waived these deductions does not change the loan value. That loan value is provided for in the policy.

I believe that they are going to urge that a loan was made on this policy on October 28, 1946, in the sum of \$1,394. I do not understand the answer when they speak of \$1,402. In the letter from Mr. Calderwood to Mrs. Wisting he states the amount as \$1,394. I don't know what the loan agreement provides as far as interest is concerned, but I believe it provides interest shall be paid at the next premium due date, which was November, and the company withheld five or six dollars to pay interest on the loan to November, and that at that time, November 21, 1946, there was indebtedness against the policy of approximately \$1,400, with a loan value thereon of \$1,446; the semi-annual [16] premium on the policy was \$66. If there was \$46, say, to the credit of this policy under the loan provision, it is going to be our contention that would have been ample to have kept this policy in effect for a period of less than sixty days, and I do not believe that there will be any disagreement on that score.

The automatic loan provision provides that if there is any reserve at the time of a lapse, that excess of the loan value over the indebtedness against the policy will be applied to the purchase of the

same kind of insurance the man has until it is exhausted, and at any time while the policy is in force, under the succeeding paragraphs, the insured may resume payment of the premiums. We are going to contend under that provision that the policy could have been carried. I am mindful of the fact that that question was raised in the Griffin case and the Court said it did not apply by virtue of a provision in the policy which does not exist in this policy.

I will further state to the Court at this time that they have before them, I believe, a loan agreement which Mr. Wisting signed. I am not objecting to his signature, but I believe that when the correspondence in connection with that loan agreement is before the Court, and the loan agreement itself, that it will be found that the company did not properly foreclose this loan against the policy. I believe the loan agreement will show that they were required to give notice of the foreclosure of this loan to the insured, and that that notice was required [17] before they could foreclose this loan on the policy.

It should be borne in mind, your Honor, that the insured was totally and permanently disabled from the 24th of November, during the period of the days of grace, and most certainly, had the company sent a notice at that time, the widow would have received it and certainly would have done something about paying up this loan on the policy.

I would like, as far as the evidence of the plaintiff in this matter is concerned, to introduce the

deposition of Mr. Calderwood, together with the policy itself, and as to the other matters, I believe I will first have to hear what Mr. Calderwood has to say.

Mr. Sayre: If the Court please, are we arguing this case at this time?

Mr. Sandeberg: No. I was merely telling the Court what I was going to contend.

Mr. Sayre: My contention is that the insured waived the provisions of deducting the premiums to the end of the policy year, and I believe Counsel for the plaintiff is mistaken in assuming the defendant company waived something. The insured waived the mandatory provision of the policy, if it was such. There was no requirement that they be deducted.

I may go further, since we are assuming—I want to go into this matter later on. In due time I want to be heard on these matters, but I think probably we should go ahead and [18] try the case first.

The Court: You are offering two things?

Mr. Sandeberg: I am offering the deposition and the policy. I believe at the present time that is all, although, in the light of Mr. Calderwood's testimony, I may have to ask leave to introduce other matters.

I want to state this: I asked Counsel specifically whether he was following the Griffin case, that such matters, that such provisions, were for the benefit of the company and the company could waive them, and my understanding was that Counsel said the

company could waive them. I do not like to transfer horses in midstream, but I asked Counsel if it was his contention the company waived, and he said that was his contention. Unless the Court excuses him from that contention, I want him held to it.

Mr. Sayre: If the Court please, I would like to have that matter clear. In the argument there was a question whether or not this man, in accepting the loan, in receiving the notice and statement, had waived the requirements, if there were such, under the policy that the premium be deducted from his loan. I will urge, if that is their contention, that in accepting the loan he waived the provisions of the policy. I would like that clear. I am not receding from the position in the Griffin case, but I would like that made clear to the Court.

The Court: Let us follow the usual course. He is offering [19] two exhibits.

Mr. Sandeberg: I am offering first the stipulation and the policy as well as the deposition of Mr. Calderwood, and the premium receipt. I have handed to the Clerk everything that I have on this matter, although I understand that Mr. Sayre has brought all his records with him and there may be certain things in his records that we would like to have marked at this time.

Mr. Sayre: May I see the exhibits, if they are to be introduced?

Mr. Sandeberg: What I was doing was asking that they be identified in the pre-trial procedure.

Mr. Sayre: Are any of these exhibits to be of-

ferred in evidence now? At the time they are offered in evidence I will have objections to certain of them on certain grounds.

The Court: Offer them one at a time, Mr. Sandeberg.

Mr. Sandeberg: I offer what has been marked No. 2 for Identification, being the policy.

Mr. Sayre: No objection.

The Court: Received.

(Policy of Insurance No. 34538, Gustav H. Wisting, Amount \$5,000, thereupon received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Sandeberg: I ask to have introduced Plaintiff's Identification No. 3, being the receipt covering payment of [20] premium, dated June 19, 1946, for the premium due May 21, 1946.

Mr. Sayre: No objection.

The Court: Admitted.

(Receipt for premium, in amount \$68.75, dated June 19, 1946, thereupon received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Sandeberg: I now offer in evidence as Plaintiff's Exhibit No. 1 the stipulation, being a stipulation as to the testimony of the plaintiff, were she present. I understand Mr. Sayre has no objection.

Mr. Sayre: We are presently willing to stipulate to the matter set forth in the stipulation, but we reserve the right as to objections as to competency and materiality, and I want to object to the use

of the stipulation in evidence on the ground that the matters set forth in the stipulation would not be relevant or material in this case, having no bearing upon the issues in the case.

The Court: Admitted, subject to the objection.

(Stipulation by and between the attorneys for the respective parties in re testimony of Mabel E. Wisting, Plaintiff, thereupon received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. Sandeberg: The other matters I will withhold offering at this time. [21]

The Court: You rest, then?

Mr. Skulason: May I ask the Court a question? Are we going through the formalities of pre-trial procedure or trying the case?

The Court: Just the trial.

Mr. Skulason: This is the trial of the case?

The Court: Correct.

Mr. Sandeberg: Mr. Sayre, have you any previous premium receipts?

Mr. Sayre: We have not the file of premium receipts, but we have the collection card which I think is a better record to work from. It shows the dates the premiums were paid. This comes from the records of the company.

Mr. Sandeberg: You have no premium receipts?

Mr. Sayre: We have only copies. This is November 21, 1946—

Mr. Sandeberg: That, of course, is the premium notice.

Mr. Sayre: The premium notice. We have the

collection card which shows the date of payment of all premiums.

Mr. Sandeberg: May I put this in evidence or do you intend to put it in?

Mr. Sayre: We are perfectly willing to put it in. If the Court please, I might say for the record that digging out of the copies of premium notice over a twenty-year period would be quite a job, and probably many of the records go back that far and would not be available, but the collection card would show [22] all the dates of payment and the amounts.

Mr. Sandeberg: Would you mark this for identification?

(Premium Notice, in Amount \$66.05, due date November 21, 1946, thereupon marked Plaintiff's Identification No. 4.)

Mr. Sandeberg: There is a letter that the insured wrote when he asked that the loan be made.

Mr. Sayre: I don't know of any such a letter.

Mr. Sanderberg: Didn't he write you about it?

Mr. Sayre: I think possibly that sort of a matter should be covered by Mr. Calderwood on the witness stand. I believe the records contain some letters, some correspondence, which passed back and forth, but we do not have in our records, and have not been able to find, a letter from him to the company, asking for a loan. It is possible that he negotiated that part of it with a representative of the company, because there are numerous representatives of the company. Nevertheless, we have the

loan agreement and the records of the loan, but as far as the letter itself is concerned, we do not have that.

Mr. Sandeberg: If you have got your letter of transmittal of the loan, I would like to have that marked.

Mr. Sayre: I might say, your Honor, that the company keeps a folder on each policy, including the company's record of the policy, and all matters relating to it. I would suggest that if we are going to put part of this in that we should mark the [23] record of this policy. I am perfectly willing that the entire matter be admitted in evidence.

The Court: Do it that way. Let the file all go in as one exhibit.

Mr. Sandeberg: Are you putting that in?

Mr. Sayre: It is all right if it goes in as our exhibit.

Mr. Sandeberg: All right; put it in, then. If you want, you can put the card in, too, and the whole business. Do I understand that is your entire file?

Mr. Sayre: That is all, except the checks. Those were not part of that file.

(Correspondence file of defendant relating to insured thereupon received in evidence and marked Defendant's Exhibit No. 8.)

The Court: The question now is: Have you rested, Mr. Sandeberg?

Mr. Sandeberg: I will in a second, your Honor.

Mr. Sayre: We would like to have the whole matter in. I will stipulate with them right now that they go in.

Mr. Sandeberg: I would like to have that go in as a defendant's exhibit.

Mr. Sayre: If you want that all in as a defendant's exhibit, I will do that eventually.

Mr. Sandeberg: All right. We rest.

(Plaintiff Rests.) [24]

Mr. Sayre: For the record, your Honor, I would like to move for a nonsuit. I will not burden the Court with any argument, unless you so desire.

The Court: I will reserve decision to the end of the case.

Defendant's Testimony

Mr. Sayre: We would like to call Mr. Calderwood, the Secretary of the Standard Insurance Company.

ROBERT W. R. CALDERWOOD

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sayre:

Q. Mr. Calderwood, you are Secretary of the Standard Insurance Company? A. I am.

Q. Are you familiar with the Gustav H. Wisting policies? A. I am.

Q. You have brought the records concerning those policies to this Court? A. I have.

(Testimony of Robert W. R. Calderwood.)

Q. The policy in question in this litigation bears your number 34538? Did the insured, George H. Wisting, or Gustav H. Wisting, have other insurance with your company? A. He did. [25]

Q. Were those other policies paid?

A. Yes, they were.

Q. This policy, No. 34538, was that paid or not?

A. No, it was not.

Q. For what reason was this policy not paid?

A. It was not in force at the time of his death.

Q. You have brought the records. May we have the file? May I ask, is there a memorandum in the exhibit (Defendant's Exhibit No. 8) concerning the calculation on this policy? It is a plain typewritten page with the calculations. It is a letter-sized page, with calculations.

The Court: You will have to come up and look.

Mr. Sayre: I believe Defendant's Exhibit No. 8 has been identified. We would like to offer it in evidence at this time, being the file covering Policy No. 34538. The record may show that, at Counsel's suggestion, we are putting in the original of the letter of January 8, 1947, in lieu of the copy of the lapse notice which was loose in the file. The original which Mr. Sandeberg has asked be put in, which has been marked Plaintiff's Exhibit No. 6 for Identification, has attached to it the application for reinstatement.

Mr. Sandeberg: I would like to have that marked.

(Testimony of Robert W. R. Calderwood.)

(Letter dated January 8, 1947, Standard Insurance Company to Mr. George H. Wisting, re: Policy No. 34538, with blank form of application for [26] reinstatement attached, thereupon received in evidence and marked Plaintiff's Exhibit No. 6.) (Part of Defendant's Exhibit No. 8.)

Mr. Sandeberg: The Clerk has just handed me Plaintiff's Exhibit No. 7 for Identification. I thought I had offered this and that it had been received.

Mr. Sayre: There is no objection to the admission of Plaintiff's Exhibit No. 7 for Identification. It is my understanding that stands in lieu of the original.

Mr. Sandeberg: Yes, it stands in lieu of the original.

The Court: It may be admitted.

(Document heretofore marked for identification as Plaintiff's Exhibit No. 7 thereupon received in evidence and marked Plaintiff's Exhibit No. 7.)

Q. (By Mr. Sayre): On this file (Defendant's Exhibit No. 8), can you give the history of this policy and tell us, first, what the premiums were in 1946 and why they were different than in the original policy?

A. The policy originally did not provide added benefits for disability and waiver of premium.

(Testimony of Robert W. R. Calderwood.)

Those two added benefits were included in the policy at a later date.

Q. Was the premium of \$66.05 the correct sum, the correct semi-annual premium, in 1946?

A. It was. [27]

Q. What were the due dates for the premiums?

A. I would have to have the policy.

Mr. Skulason: Isn't that shown by the record? There is no need of spending the time of this witness.

The Court: Mr. Sayre may put it in the way he wants to.

A. The premium due dates were May 21st and November 21st.

Mr. Sandeberg: With regard to this file of the company (Defendant's Exhibit No. 8), I am going to make a blanket objection to the introduction thereof and not argue it at this time, to save the time of the Court. My objection is that it is incompetent, irrelevant and immaterial.

The Court: Admitted, subject to objection.

Q. (By Mr. Sayre): By reference to the record of this policy (Defendant's Exhibit No. 8), will you tell the Court when the insured George H. Wisting (Gustav H. Wisting) borrowed money on that policy?

I beg your pardon. Perhaps I should put in one more exhibit before I go into this matter, if I may. May we have the duplicate of the check and the memoranda of the loan marked as Defendant's Exhibit No. 9?

(Testimony of Robert W. R. Calderwood.)

Mr. Sandeberg: May the record show, in order to save time, that I am making a general objection on the ground of incompetency, irrelevancy and immateriality as to all of these exhibits Counsel is offering.

The Court: It is so understood. Admitted.

(Duplicate copy of Check No. A-97634, in amount \$2,477.30, Standard Life Insurance Company, payable to George H. Wisting, and attached memoranda, thereupon received in evidence and marked Defendant's Exhibit No. 9.)

Mr. Sayre: May we have marked as an exhibit memoranda of calculations upon this policy, Policy No. 34538.

Mr. Sandeberg: The same objection.

The Court: Admitted, subject to the objection.

(Memorandum containing calculations as to Policy No. 34538, George H. Wisting, thereupon received in evidence and marked Defendant's Exhibit No. 10.)

Mr. Sayre: Will the Bailiff please hand Exhibits 9 and 10 to the witness.

Q. Will you, Mr. Calderwood, from the file, review the history of the loan, the payment of premiums and the notices given?

A. On October 28, 1946, the company made a loan on this policy for the full value at that time. They deducted the interest on the existing loan up to the date of the new loan, and this loan, in con-

(Testimony of Robert W. R. Calderwood.)

junction with loans on other policies, was completed and a check for the gross amount of all loans was forwarded to him on that date.

Q. Would you give the breakdown on the loan on Policy No. 34538?

A. The new loan in this case amounted to \$1,394. The old loan, [29] then existing, amounted to \$600. This made an increase of \$794. The interest deducted amounted to \$15.70, making the net proceeds to the insured on this policy \$778.30.

Q. Was that the full loan value on the policy?

A. That was the full loan value of the policy at that time.

Mr. Sandeberg: If the Court please, I did not get my objection in soon enough, but I believe the policy is the best evidence of the full loan value, and that this is a conclusion of the witness. I should like to have an objection to any testimony of this nature.

The Court: Proceed. It is admitted, subject to the objection.

Q. (By Mr. Sayre): Mr. Calderwood, when was the next premium due date?

A. The next premium due date was November 21, 1946.

Q. When was a notice mailed to the insured of the November 21, 1946, premium due? Will you give us the exhibit number of the pink slip?

A. Exhibit No. 7.

Q. What is that?

(Testimony of Robert W. R. Calderwood.)

A. That is the company's record of the issuing of the notice.

Q. When was that notice mailed to the insured?

A. That notice was mailed to the insured approximately fifteen days prior to the due date of the premium.

Q. How was that notice given? Will you explain.

A. The notice was mailed in the—deposited in the mail, [30] addressed directly to the insured at his address, 3378 Tareco Drive, Los Angeles, California.

Mr. Sayre: May we at this point have the original notice which has been brought to court by Mr. Sandeberg, marked as Exhibit No. 4, shown to the witness.

(Plaintiff's Exhibit 4, original notice, thereupon received in evidence.)

(Plaintiff's Exhibit No. 4 handed to the witness.)

Q. (By Mr. Sayre): Plaintiff's Exhibit No. 4, is that the original of the office record which you have been testifying concerning?

A. That is the original notice, yes.

Q. That was the notice you mailed to the insured?

A. Yes, that was the notice mailed to the insured, showing the premium which became due, \$66.05.

(Testimony of Robert W. R. Calderwood.)

Q. Was the premium which became due on November 21, 1946, paid? A. It was not.

Q. Was any premium paid for the premium of May 21, 1946?

A. The company placed an automatic premium loan against the contract which carried the contract from November 21, 1946, to November—from May 21, 1946, to November 25, 1940.

Q. Do you have a memorandum of the calculation of the automatic loan against this policy?

A. I do.

Q. What is the exhibit number? A. 10.

Q. Exhibit No. 10 represents the calculation of the automatic [31] loan against the policy, is that correct? A. It does.

Q. By reference to that, will you state what the full loan value was to the date of the automatic loan?

A. The full loan to November 26th—

Mr. Sandeberg: The same objection.

A. —the date to which the loan ran, amounted to \$1,402.36.

Q. (By Mr. Sayre): What were the charges against that?

A. The charges against that were the original loan of \$1,394, the loan interest due and unpaid from October 28th to November 21st of \$5.16, a portion of the premium to November 25th of \$1.45 and additional interest on the increased loan of \$1.81, bringing the total outstanding on November 25th to \$1,402.42.

(Testimony of Robert W. R. Calderwood.)

Q. Exceeding the then loan value?

A. Slightly in excess, yes.

Q. Mr. Calderwood, in making the loan which was closed on October 28, 1946, if an additional semi-annual premium had been deducted to carry the policy to May 21, 1947, would there have been an additional loan value and, if so, would the deduction for premium have equaled the additional loan value? Will you explain that?

A. The deduction of an additional premium, assuming a premium paid then, would have automatically increased the loan value. The amount receivable by the insured would be less in that event.

Q. Would it be correct to say that the insured would have [32] borrowed less if the next semi-annual premium had been deducted?

A. That would be true.

Q. Can you say by approximately what amount?

A. I don't have before me the exact figures on that.

Q. I believe that is immaterial. Mr. Calderwood, did you give the insured notice of the lapse of this policy? A. We did.

Q. I believe it is Exhibit No. 6. Is that the correct exhibit? Was that notice (Plaintiff's Exhibit No. 6) given to the insured?

A. That was given on January 8th.

Q. How was that notice given?

A. In the form of a letter deposited in the mail on that date.

(Testimony of Robert W. R. Calderwood.)

Q. Addressed to the insured?

A. Addressed to the insured at the address given.

Q. To his address in Los Angeles, California?

A. That is right.

Q. Exhibit No. 6, introduced by the plaintiff, is the original of that notice?

A. This is the original.

Q. Did the insured sign a loan agreement on that loan? A. He did.

Q. Is that part of the file shown in Exhibit No. 8?

A. Exhibit No. 8, that is a part of the file.

Q. Was a statement of the loan given to the insured at that time? [33] A. It was.

Q. And did the insured return the original of the statement and the loan agreement to you?

A. Yes, he did. He returned that to us.

Q. Both the loan agreement and the original of the statement were had by the insured prior to the completion of the loan? A. They were.

Q. Has the loan which, on November 25, 1946, amounted to \$1,402.42 ever been paid to the company? A. It has not.

Mr. Sandeberg: What was the figure you read?

Mr. Sayer: I asked him whether the loan which on November 25, 1946, was in the sum of \$1,402.42 had been repaid, and the witness answered that it has not been paid.

Q. Has any part of the indebtedness on the policy, Policy No. 34538, been paid?

(Testimony of Robert W. R. Calderwood.)

A. No part of it has been paid.

Mr. Sayre: I believe that is all.

Cross-Examination

By Mr. Sandeberg:

Q. Mr. Calderwood, according to your files, between the date that the premium notice was sent, which I believe you said was about fifteen days before the due date for the premium to be paid or about fifteen days before November 21, 1946, and the date, January 18, 1947, the date of the insured's death, was [34] any notice of any sort sent to the insured, or any mail directed to him, save and except the lapse letter dated January 8th?

A. No notice was sent.

Q. So the only thing sent to him between the time of receiving the premium notice about the 5th of November and the date of his death, was the lapse letter, is that correct?

A. That is correct.

Q. Are you familiar with the policy loan agreement which is in evidence as part of Defendant's Exhibit No. 8? Are you familiar with its terms generally? A. Yes.

Q. Do you know when this agreement provides that interest is to be paid on the policy or on the loan?

A. The anniversary date of the policy.

Q. Would this be correct: "To pay the company on the next premium anniversary of said policy interest on said loan at the rate of six per

(Testimony of Robert W. R. Calderwood.)
cent per annum from the date of this agreement to said anniversary." Would that be correct?

A. That is correct.

Q. When was that anniversary?

A. The next anniversary date of the policy would be May 21st.

Q. "To pay the company on the next premium anniversary of said policy interest on said loan at the rate of six per cent per annum from the date of this agreement to said anniversary."

As a matter of fact, then, there was no interest due [35] on this policy until the next anniversary date, was there?

A. No, there would be no attempt to collect interest until the next anniversary date.

Q. That is correct? A. Yes.

Q. Why did you deduct interest on November 21st to bring the old loan into the same position as the new loan? Do you deduct interest if it is not due?

A. It was due on the old loan. We have to include the old loan in the new loan.

Q. Mr. Calderwood, I will refer you to the computation from which you have been testifying (Defendant's Exhibit No. 10). I will ask you why, on November 21, 1946, you deducted interest? November 21st is the date I am speaking of, not October 28th. Why did you deduct interest at that time?

A. Interest must be taken into consideration to

(Testimony of Robert W. R. Calderwood.)

determine the net amount available to pay premiums.

Q. You did that regardless of the fact that the loan agreement provided that there was no interest due until May?

A. Interest would naturally be due in May if we gave him the full amount, if the company loaned the entire value, and if interest was not paid in May we would not be able to collect that amount.

Q. Mr. Calderwood, you just told me that this agreement provides for payment on the next premium anniversary, to pay the company [36] interest at the rate of six per cent, and you said the next premium anniversary was in May.

What I am asking you is this: I understand you collected interest on the previous loan when the new loan was made in October. I know you did that. Why, in November, did you deduct interest, or did you apply part of the cash value or loan value?

A. That is right, part of the cash value. What would be used to pay interest if it was not paid that way?

Q. Even though it was not yet due?

A. That is right.

Q. Under the terms of the loan agreement?

A. It would be due if the premium were not paid. In order to determine the value, we had to carry the policy further.

(Testimony of Robert W. R. Calderwood.)

Q. As it stands now, then, though the loan agreement provides that interest is not yet due, you go ahead and consider an indebtedness against the policy, is that correct?

A. That is right.

Q. Why did you deduct anything for interest after November 21st until the 25th of November?

A. It would be necessary to do so to get your calculation to determine the net value.

Q. Is there any provision in the policy—You contend that it lapsed and that the automatic premium loan provision went in on the 21st of November, do you not? [37]

A. That is right.

Q. When the automatic premium loan goes in, do you continue to charge interest on the loan?

A. We do.

Q. Is there anything in the policy that states you have that right? A. You have to.

Q. I asked you if there was anything in the policy that states you have that right?

A. In the automatic premium loan provision, yes.

Q. Will you point that out to me, please? I am asking you to point out where, in the policy, you are given the right to deduct that interest.

Mr. Sayre: After all, your Honor, this is a matter of reading the policy. I think it is argumentative and objectionable for that reason.

The Court: He may answer, subject to the objection.

(Testimony of Robert W. R. Calderwood.)

A. The policy provides in Section VII that in such event the company will "without request, charge the amount of such premium, with interest in advance to date next premium is due."

Q. (By Mr. Sandeberg): That is interest on the premium, isn't it?

A. Yes, that is interest on the premium. It states further: "The whole or any part of the indebtedness may be repaid at any time while the policy is in force." Then it says: "The existing [38] indebtedness may be paid either in whole or in part, or allowed to remain as a loan on the policy, subject to interest."

Q. Which provision is that?

A. That is in the "Automatic Premium Loan" provision.

Q. That provision says that the insured may pay it, is that correct? So, while the automatic premium loan provision is in effect, the insured had a right to repay the loan in whole or in part, is that correct?

A. That is right, or may allow the loan to stand, subject to interest.

Q. Paragraph III of the loan agreement reads as follows: "Failure to repay said loan, with interest, as herein provided, or to pay any indebtedness on account of said policy, or the interest thereon, shall not terminate the policy unless the total indebtedness thereunder, including accrued or accruing interest, shall equal or exceed the loan

(Testimony of Robert W. R. Calderwood.)
value of the policy at the time of such failure." Do you recognize that provision? A. Yes.

Q. Do you recognize the next sentence in Paragraph III of the loan agreement? "In this event the policy shall terminate 31 days after the company shall have mailed notice to the last known address of the insured and any assignee of record, and shall be deemed surrendered in consideration of the cancellation of all indebtedness thereunder." Do you recognize that provision of the loan agreement? [39] A. Yes.

Q. Why didn't you mail that notice?

A. In this case the insured had received notice of his premium and not only failed to pay the interest on the loan, but he failed to pay the premium then due.

Q. Was any notice whatsoever sent the insured concerning the loan after the loan was made? Between then and the time of his death was any notice whatsoever sent to him concerning the loan?

A. No notice concerning the loan.

Q. No notice whatsoever?

A. Until the lapse letter went January 8th.

Q. Did the lapse letter say anything about the loan?

A. I would have to read it. No, the lapse letter did not mention the loan.

Q. So no notice of any sort was mailed to him about the loan? A. No.

Mr. Sandeberg: That is all.

Mr. Sayre: That is all.

(Witness excused.)

Mr. Sayre: If the Court please, we understand there is no objection to copies in place of originals, in connection with all these exhibits. If that is so, that being the case, we rest.

(Defendant Rests.) [40]

Mr. Sandeberg: There is one letter, that of April 1st, 1947, a copy of which we have marked Exhibit No. 5, which should perhaps be in.

(Copy of letter dated April 1, 1947, R.W.R. Calderwood, Secretary, Standard Insurance Company, to Mrs. George H. Wisting, thereupon received in evidence and marked Plaintiff's Exhibit No. 5.)

Mr. Sandeberg: The plaintiff would ask leave of the Court at this time to amend in conformity with the proof in this matter, as it has developed either by way of the amended complaint or by the reply.

The Court: Do you have any rebuttal?

Mr. Sayre: No, we have no rebuttal.

The Court: I will tell you what I want you to do, Gentlemen: I want you to state your positions in writing and then I will hear you in argument afterwards. Mr. Sandeberg, you write up what amendments you want to make.

Mr. Sandeberg: All right, sir.

The Court: We will follow our usual course

here. You will file your statement first, Mr. Sandeberg. How much time do you want to take? Take whatever time you need.

Mr. Sandeberg: Would two weeks be satisfactory?

The Court: Yes. You want two weeks, also?

Mr. Sayre: Yes, your Honor. [41]

Mr. Sandeberg: May I have access to the exhibits?

The Court: All right.

Mr. Sayre: I suggest that both counsel, for the plaintiff and for the defendant, have access to the exhibits for the purpose of preparation of their statements.

The Court: Yes. That can be arranged.

REPORTER'S CERTIFICATE

I, Ira G. Holcomb, Official Reporter of the above-entitled Court, do hereby certify that on Friday, the 4th day of February, A.D. 1949, I reported in shorthand certain proceedings had upon the trial of the above-entitled matter, that I thereafter caused my said shorthand notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisting of pages numbered 1 to 42, both inclusive, constitutes a full, true and accurate transcript of said proceedings so taken by me in shorthand on said date, as aforesaid, and of the whole thereof.

Dated this 16th day of June, A.D. 1949.

/s/ IRA G. HOLCOMB,
Official Reporter.

[Endorsed]: Filed July 8, 1949. [42]

[Endorsed]: No. 12330. United States Court of Appeals for the Ninth Circuit. Standard Insurance Company, a corporation, Appellant, vs. Mable E. Wisting, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed Aug. 15, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 12330

MABLE E. WISTING,

Appellee,

vs.

STANDARD LIFE INSURANCE COMPANY,
an Oregon corporation,

Appellant.

O R D E R

This matter coming on to be heard upon the Motion of the appellant for an Order dispensing with the printing in the printed transcript of record on appeal herein of all exhibits introduced by plaintiff or defendant during the trial of this cause;

And it appearing that such Motion is based upon a Stipulation therefor between appellant and appellee, and that said Motion is well taken and should be allowed;

Now Therefore, It Is Hereby Ordered, that the printing in the printed transcript of record on appeal herein of all exhibits introduced by the plaintiff or defendant during the trial of this cause be and the same hereby is dispensed with, and that this Court shall consider such exhibits in their original form without reproduction in the printed transcript of record on appeal.

Dated this 23rd day of August, 1949.

/s/ WILLIAM DENMAN,

Judge, United States Court of Appeals for the
Ninth Circuit.

/s/ HOMER T. BOONE,

/s/ WM. E. ORR,

Judge U. S. Court of Appeals for the Ninth
Circuit.

[Endorsed]: Filed Aug. 24, 1949. U.S.C.A.

[Title of Court of Appeals and Causes.]

AFFIDAVIT

State of Oregon,

County of Multnomah—ss.

I, Paul A. Sayre, being first duly sworn on oath, depose and say: I am one of the attorneys for the appellant in the above entitled cause.

All exhibits introduced by plaintiff or defendant during the trial of this cause have been designated as portions of the record on appeal pursuant to Rule 75(a). Several of such exhibits contain extraneous material not pertinent to the issues on appeal and are in such form and length that they cannot be practicably reproduced in the printed transcript of record on appeal. In order to avoid unnecessary lengthening of the record and consequent additional expense, the appellant and appellee have entered into a Stipulation in which they have agreed, subject to approval of this Court,

that all original exhibits introduced by plaintiff or defendant during the trial of this cause may be considered in their original form without reproduction in the printed transcript of record on appeal.

/s/ PAUL A. SAYRE,

Subscribed and sworn to before me this 22d day of August, 1949.

[Seal] /s/ J. H. HOLLOWAY,
Notary Public for Oregon.

My Commission Expires 10/7/49.

[Endorsed]: Filed Aug. 24, 1949. U.S.C.A.

[Title of Court of Appeals and Cause.]

M O T I O N

Comes now the appellant and moves the Court for an Order dispensing with the necessity for reproducing in the printed transcript of record on appeal herein all exhibits introduced by plaintiff (appellee) or defendant (appellant) during the trial of this cause, and directing that such exhibits will be considered by this Court in their original form without reproduction in the printed transcript of record on appeal. This Motion is made upon the ground and for the reason that several of such exhibits contain extraneous material not pertinent to the issues on appeal and cannot be practicably reproduced in their entirety in the printed record, and is based upon the affidavit of Paul A. Sayre, and the Stipula-

tion of the appellant and appellee hereunto attached.

Dated at Portland, Oregon this 22nd day of August, 1949.

WINFREE, McCULLOCH,
SHULER & SAYRE.

By/ s/ PAUL A. SAYRE,
Attorney for Appellant.

[Endorsed]: Filed Aug. 24, 1949. U.S.C.A.

[Title of Court of Appeals and Cause.]

STIPULATION AS TO AND DESIGNATION
OF CONTENTS OF RECORD ON APPEAL
TO BE PRINTED

It is hereby stipulated and agreed by and between the appellant and the appellee herein by and through their respective attorneys of record that several of the exhibits introduced during the trial of this cause contain extraneous material not pertinent to the issues on appeal, and are in such form and length that they cannot be practicably reproduced in the printed transcript of record on appeal, and that in any event their reproduction in the printed transcript of record on appeal would unnecessarily lengthen the record and substantially increase the expense of printing it.

And it is further stipulated and agreed that, subject to the approval of this Court, all exhibits introduced by plaintiff or defendant during the trial

of this cause may be considered by this Court in their original form without reproduction in the printed transcript of record on appeal, and that the appellant shall forthwith move this Court for an Order dispensing with the printing of such exhibits and directing that they will be considered by this Court in their original form without reproduction in the printed transcript of record on appeal.

And it is further stipulated and agreed that the following shall be included in the printed transcript of record on appeal herein, and the appellant and appellee hereby designate the following:

1. The entire certified Transcript of Record herein, including:

(a) Items 1 to 18, inclusive, of Appellant's Designation of Portions of Record on Appeal Pursuant to Rule 75(a), except such exhibits as the Court may order to be considered in their original form without reproduction in the printed Transcript of Record on appeal.

(b) Items 1 to 7, inclusive, of Appellee's Designation of Portions of Record on Appeal Pursuant to Rule 75(a).

2. Motion of Appellant for an Order dispensing with the printing of exhibits in the printed Transcript of Records on Appeal, and Affidavit in support thereof.

3. Order of the United States Court of Appeals for the Ninth Circuit dispensing with the printing of exhibits in the printed transcript of record on appeal and directing that such exhibits shall be con-

sidered by said Court in their original form without reproduction.

4. This Stipulation as to contents of record on appeal to be printed.

Dated this 22nd day of August, 1949.

/s/ PAUL A. SAYRE,

Of Attorneys for Defendant-
Appellant.

/s/ DAVID SANDEBERG,

Of Attorneys for Plaintiff-
Appellee.

[Endorsed]: Filed Aug. 24, 1949. U.S.C.A.